DATE: JUNE 30, 1995

CASE NO: 94-INA-301

In the matter of

GPF SYSTEMS, INC.
Employer

on behalf of

Alexandre Mendelev
Alien

BEFORE: Clarke, Jarvis, and Williams
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from GPF Systems, Inc.'s ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor in ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public

employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On July 31, 1992, Employer filed a Form ETA 750 Application For Alien Employment Certification with the Connecticut Department of Labor ("CDOL") on behalf of the Alien, Alexandre Mendelev. The job opportunity was listed as Software Engineer. The application required a B.S. Degree in Mathematics or Computer Science and five years experience in the job. Special Requirements called for a minimum of two years technical expertise in the OS/2 operating system (AF 93). The description of job duties included the following:

> Interacts with technical staffs in Russia and Ukraine on joint development project to design systems level programs. Use knowledge of Russian-Ukrainian programming capabilities and ideologies to supervise work to be conducted in Kiev. Id.

On November 9, 1993, the CO issued a Notice of Findings ("NOF") in which he proposed to deny the application unless Employer submitted evidence that: 1. The job opportunity was being described without unduly restrictive requirements. On this point the CO referred to the job duties including the knowledge of Russian-Ukrainian programming capabilities and the rejection of six applicants because they had "no Russian". The CO queried whether this was an additional language requirement or another way of referring to the Russian-Ukrainian programming capabilities requirement (AF 15); 2. Whether the Alien's experience was obtained on the job (AF 15-16); and 3. Whether U.S. applicants were rejected for other than job-related reasons. The NOF did not name any of the rejected applicants but told Employer to "Please submit convincing documentation to justify the rejection of these U.S. applicants" (AF 16).

Employer filed a rebuttal to the NOF on December 8, 1993. Its president stated that: 1. In the past, Employer had cooperative arrangements with NPO Gorsystemotechnika and other firms in the Ukraine. As a result of these experiences, it confirms that there are vast differences between Western (American and West European) programming capabilities and philosophies and those of the former Soviet Union. It is necessary to understand those capabilities in dealing with companies in Russia and the Ukraine. Therefore, the requirement

for knowledge of Russian-Ukrainian programming capabilities is a business necessity; 2. The person in the job would be travelling to the Ukraine for one week every three months and would have to interact in writing and on the telephone with programmers in the Ukraine; 3. The Alien obtained his experience with NPO Gorsystemotechnika, an unrelated company; 4. The comment of "no Russian" on the report to the CDOL about the rejection of applicants was meant to indicate the lack of Russian-Ukrainian programming capabilities and ideologies (AF 12-13). The rebuttal concluded with the following statement:

> We hope that his letter is responsive to your comments. Should additional recruitment be necessary, we are of course willing to do it, but we would point out simple that none of the applicants had sufficient OS/2 experience to be qualified even to perform these duties wholly within the United States. We therefore feel that further recruitment would be unuseful but are willing to do it if your Department feels that it is necessary. Id.

The CO issued a Final Determination ("FD") on December 20, 1993, which denied certification. The CO found that: 1. Employer had not sufficiently documented that the requirement that an applicant be familiar with Russian-Ukrainian programming capabilities arose from a business necessity; 2. There was a question of whether supervision of work in Kiev for possible joint projects was an actual job duty; 3. It appeared that the job was tailored to the Alien because Employer was requiring fluency in the Russian language as part of the job's duties; 4. Employer rejected applicant Katherine Ricci who appeared from her resume to be qualified for a non-job-related reason (AF 7-9).

The CO denied reconsideration (AF 4). Employer filed a timely request for review (AF 5-6)

Discussion

a. Further Recruitment

Employer contends that the CO erred in issuing the FD instead of remanding or issuing another NOF to permit readvertising the position. Its Brief states that:

> Finally, the employer offered to re-recruit. BALCA has held that if the employer attempts to justify a requirement deemed "unduly restrictive" by the CO, and also expresses a willingness to delete the restriction and readvertise, and if the CO is not persuaded by the justification, then the CO must offer

> the employer the opportunity to readvertise. A Smile, Inc., 89-INA-1 (BALCA Mar. 6, 1990); Paragon Imports Corp., 91-INA-319 (BALCA Feb. 4, 1993). Brief 1-2.

While the Brief correctly states the law, the facts at bench do not come under the cases cited. In its rebuttal, Employer offered to engage in additional recruitment. However, nowhere did it indicate its willingness to delete the requirement of familiarity in Russian-Ukrainian programming capabilities (AF 12). The NOF questioned that requirement and afforded the opportunity for new recruitment if Employer could not justify it (AF 12, 14). Since the rebuttal did not state a willingness to readvertise without the restrictive requirement, the CO did not abuse his discretion in denying certification.

b. Business Necessity

Employer contends that the CO erred in finding no business necessity for the request of familiarity in Russian-Ukrainian programming capabilities.

Employer contends that no justification of business necessity is required because familiarity in Russian-Ukrainian programming capabilities was not listed as a special requirement in Item 15 of the Form 750 but as a job duty in Item 13 (Brief 1). There is no merit in this contention. Employer listed the lack of these capabilities in attempting to justify the rejection of eight U.S. job applicants (AF 22-23). It sought to uphold this as a requirement in its rebuttal (AF 11-12). The CO properly treated it as a job requirement.

As indicated, in its rebuttal, Employer submitted a letter which asserted that there were vast differences between Western programming capabilities and philosophies and Russian-Ukrainian ones. The CO considered this rebuttal and found that: "The employer's assertion that Russian and Ukrainian are completely different from the American norm (emphasis added) is unfounded. .... The above explanation does not indicate that such methods are essential to the job duties as described. While the applicant will be working with foreign programmers, the languages used to design and implement the software utilizes industry standard programming languages" (AF 8-9). The CO properly denied the application on the ground of the unduly restrictive requirement. Section 656.21(b)(2)(i); Esalen Institute Soviet American Exchange Program, 92-INA-401 (Dec. 28, 1994); Lamplighter Travel Tours, 90-INA-64 (Sept. 11, 1991).

Since the action of the CO is sustainable on the ground of the unduly restrictive requirement, it is not necessary to discuss the question of whether Employer should have been

afforded further rebuttal on the issue of whether applicant Katherine Ricci was rejected for a non-job-related reason and if fluency in the Russian language was a de facto job requirement.

Order

The Final Determination of the Certifying Officer is affirmed and labor certification is denied.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, CA

DBJ/bg